BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.24.201, 17.24.202, 17.24.203, 17.24.206 17.24.207, 17.24.212, 17.24.213, 17.24.214, the)))	PRESIDING	OFFICER	REPORT
adoption of new rules I through X, and the repeal of 17.24.204, 17.24.205 and)			
17.24.204, 17.24.203 and 17.24.215 pertaining to opencut mining)			

INTRODUCTION

- 1. On November 5, 2003, I presided over and conducted the public hearing held in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to take public comment on the above-captioned matter. Notice of the hearing was contained in 2003 Montana Administrative Register (MAR), Issue No. 19, MAR Notice No. 17-200, published on October 16, 2003, beginning at page 2190. A copy of the notice is attached to this report.
- 2. The hearing began at about 9:03 a.m. and concluded at about 9:23 a.m. Debbie Voeller of DEQ Permitting and Compliance Division operated a tape recorder to record the hearing.
- 3. At the hearing I identified and summarized the MAR notice, stated that copies of the MAR notice were available in the hearing room, read the Notice of Function of Administrative Rule Review Committee as required by Mont. Code Ann. § 2-4-302(7)(a), informed the persons at the hearing of the rulemaking

interested persons list and of the opportunity to have their names placed on that list, recited the authority to make the proposed rule amendments, announced the opportunity to present matters at the hearing or in writing, as stated in the MAR notice, and explained the order of presentation.

SUMMARY OF HEARING

- 4. Neil Harrington, Chief, Industrial & Energy Minerals Bureau, Permitting and Compliance Division, DEQ, made an oral statement briefly summarizing the rulemaking. He explained that the rulemaking is being proposed to make the rules consistent with legislation in 1999 and 2001 pertaining to the Opencut Mining Act, to reorganize the rules so they are easier to use, to clarify requirements, to remove existing rule 17.24.215 because the pertinent language is now in the Opencut Mining Act, and to make the rules more understandable and usable by operators.
- 5. Mike Kakuk of Helena, attorney for the Montana Contractors Association, asked questions about various rules.
- a. The definition of "access road" in 17.24.202(1) refers to "disturbances" related to access roads. He asked how broad that term was meant to be. Mr. Harrington explained that the term was a catch-all term for disturbances related to road construction and was not intended to change the way DEQ now regulates access roads or extend regulation off the mining site.
- b. Mr. Kakuk asked about the change in the language in 17.24.212(1). The current rule states that DEQ shall conduct a detailed examination of an application. The proposed

amendment states that DEQ shall inspect the proposed site and evaluate the application. Mr. Jerry Burke, Industrial & Energy Minerals Bureau, explained the proposed language is more specific, but is not intended to change current practice, which is to conduct an on-site pre-mine inspection. Under the Opencut Mining Act (Mont. Code Ann. § 82-4-432(4)), DEQ has 30 days after receipt of a complete application to approve or deny the application, but may extend the time for an additional 30 days. Sometimes the time period is extended when the on-site inspection is delayed for such reasons as inclement weather.

SUMMARY OF ADDITIONAL WRITTEN MATERIALS

- 6. Jolyn Eggart, DEQ counsel office, submitted a letter, memorandum, and a checklist under the Private Property

 Assessment Act, HB 311, codified as Mont. Code Ann. §§ 2-10-101 through -105. The rules affect private real property but do not have takings or damaging implications. No special findings are required by HB 521. The letter, memorandum, and checklist are enclosed with this report.
- 7. Susan Hellier of Kenai Engineering, Inc., of Gallatin Gateway, is a consultant who assists opencut operators with the permitting process. By letter dated November 4, 2003, she submitted comments about several of the rules. Generally, the comments related to the time for acting on applications, giving landowners more authority to manage their property, and the calculation of reclamation costs. The letter is enclosed with this report.

- 8. Mike Newton commented by e-mail on November 6, 2003. With respect to boundary markers being no more than 300 feet apart (New Rule III(a)), he suggested that markers be close enough to be easily seen. With respect to seeding soil that will remain for more than one year (New Rule IV(1)(b)(i)), he suggested extending the time period to three years. The e-mail is enclosed with this report.
- 9. DEQ submitted written comments after the hearing which are enclosed with this report. To summarize:
- a. In ARM 17.24.212(2)(a)(v), (vi), the words "a completed copy of the" should be added.
- b. ARM 17.24.213(2)(a) should have language added to indicate that plan of operation revisions must be submitted with an amendment application.
- c. In New Rule III(1)(f)(ii), delete "estimated" to require more accurate figures for quantities of mine material.
- d. New Rule IV(1)(c)(i) and (f)(i) should be changed to be more clear.
- e. New Rule V should have a heading that better reflects the content of the rule.
- f. New Rule IX should be changed to describe the process more accurately.
- g. New Rule X(2) should be changed to be more clear that the rule controls activities within the permitted area, and does not extend to areas where mine material is taken.

PRESIDING OFFICER COMMENTS

- 10. The Board has jurisdiction to adopt rules that pertain to opencut mining. Mont. Code Ann. § 82-4-422.
- 11. House Bill 311 (1995), the Private Property Assessment Act, codified as Mont. Code Ann. §§ 2-10-101 through -105, provides that a state agency must complete a review and impact assessment prior to taking an action with taking or damaging implications. A Private Property Assessment Act Checklist was prepared in this matter. The proposed rules do not have takings implications. Therefore, no further HB 311 assessment is necessary.
- 12. The procedures required by the Montana Administrative Procedure Act, including public notice, hearing, and opportunity for comment, have been followed.
- 13. The Board may adopt the proposed rule amendments, new rules, and repeal, or reject them, or adopt the rules with revisions not exceeding the scope of the public notice.
- 14. Under Mont. Code Ann. § 2-4-305(7), for any acts in the rulemaking process to be valid, the Board must publish a notice of adoption within six months of the date the Board published the notice of proposed rulemaking in the Montana Administrative Register, or by April 15, 2004.

Dated	this	day	of	November,	2003.

THOMAS G. BOWE
Presiding Officer